No. 88-18 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CITY OF NEW HAVEN, CONNECTICUT,

Petitioner,

vs.

JOHN O. MARSH, JR., SECRETARY OF THE ARMY, *et al.*,

Respondents.

On Petition For a Writ of Certiorari to The United States Court of Appeals For the First Circuit

BRIEF FOR RESPONDENT MALL PROPERTIES, INC. IN OPPOSITION

DANIEL RIESEL
460 Park Avenue
New York, New York 10022
(212) 421-2150

Counsel for Respondent Mall Properties, Inc.

Of Counsel:
SIVE, PAGET & RIESEL, P.C.

MARK A. CHERTOK
KAREN E. GROSS
On the Brief

QUESTIONS PRESENTED

The petition for certiorari presents the following two questions:

1. Whether the Court of Appeals correctly concluded that the District Court order vacating the denial of a permit by the U.S. Army Corps of Engineers and remanding the matter to the Corps of Engineers for further proceedings on the permit application is not a "final decision" subject to appeal under 28 U.S.C. §1291.

2. Whether the Court of Appeals correctly concluded that the appeal by the City of New Haven does not fall within the exception for appeals by federal defendants from remand orders imposing a new legal standard on the government agency because the City will be able to obtain review from the final determination of the Corps of Engineers.

PARTIES TO THE PROCEEDING

The petitioner is the City of New Haven, Connecticut. The federal respondents are John O. Marsh, Jr., as Secretary of the Army; Lt. General E.R. Heiberg, as Chief of the United States Army Corps of Engineers; Col. Thomas A. Rhen, as Division Engineer, New England Division, United States Army Corps of Engineers and the United States Army Corps of Engineers, Department of the Army. Mall Properties, Inc. is also a respondent.[1]

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[1] Mall Properties, Inc. has no parent, subsidiary, or affiliated corporations.

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BRIEF FOR RESPONDENT MALL PROPERTIES, INC. IN OPPOSITION

Respondent, Mall Properties, Inc., opposes the petition of the City of New Haven for certiorari to the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 841 F.2d 440 (1st Cir. 1988)(App. B at 3a-23a).[2] The denial of the petition for rehearing and suggestion for rehearing en banc is unreported decision, No. 87-1827, (1st Cir. April 7, 1988)(App. A at 1a-3a). The memorandum and order of the District Court is reported at 672 F. Supp. 561 (D. Mass. 1987)(App. D at 25a-84a).

JURISDICTION

The order of the Court of Appeals (App. B) was entered on March 11, 1988. The petition for rehearing and suggestion for rehearing en banc (App. A) was denied on April 7, 1988. Petitioner apparently

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[2] The decisions below and other materials are bound in an appendix submitted by petitioner City of New Haven. References to the appendix are designated parenthetically as "App." followed by the page(s) number on which the referenced material appears.

invokes jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

28 U.S.C. §1291

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Other relevant statutes and regulations are set forth in the Addendum to the brief of petitioner City of New Haven.

STATEMENT OF THE CASE

Mall Properties has been attempting since the early 1970s to develop a

regional shopping mall in the metropolitan New Haven area in order to meet an undisputed long-standing need. The site selected is situated in an industrial/commercial corridor in the Town of North Haven, parallel to the Quinnipiac River. This site had been extensively ravished and disturbed by earlier strip mining and quarrying operations, which created approximately 18 acres of low grade scrub wetlands and small ponds. The development of the mall would require the filling of these areas, together with limited amounts of natural wetlands. Consequently, the Corps of Engineers determined that development of the mall would necessitate a permit pursuant to Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. §1344, and Section 10 of the Rivers and Harbor Appropriations Act of 1899, 33 U.S.C. §403.

The Corps of Engineers' administrative process commenced in early 1979, and included the preparation and circulation of draft and final environmental impact statements pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321 et seq., and the holding of public hearings. Throughout the process, New Haven opposed the development of the mall, claiming that a North Haven mall would compete with New Haven's downtown shopping area by diverting customers and retail stores, thus adversely affecting the City's economy.

The Corps of Engineers issued its Record of Decision denying Mall Properties' permit application on August 20, 1985. (App. H 104a-272a). The document reflected the conclusions of the environmental impact statement that the proposed mall would not have significant

effects on the environment, including wetlands and flooding, and that the principal, if not sole, area of controversy surrounding the proposed development was its potential economic effect upon the City of New Haven. The Record of Decision concluded that the mall's potential for jeopardizing New Haven's efforts to stimulate development in its downtown area -- principally through an erosion of "confidence" in such efforts -- warranted permit denial. In reaching its determination, the Corps relied upon its perception, gleaned from a private meeting with the Governor of Connecticut, that the State opposed the development. (App. H at 258a-259a, 270a-272a).

Mall Properties commenced this litigation in October 1985, and moved for summary judgment in January 1986. The federal defendants cross-moved for

summary judgment, as did the City of New Haven (which had previously been allowed to intervene). The District Court ruled that (i) the Corps of Engineers' denial of permits for the proposed shopping mall, principally upon the effect of economic competition with City of New Haven, exceeded the agency's authority, and (ii) the Corps had violated its regulations and improperly relied upon the supposed opposition of the Governor of Connecticut to the proposal. On September 8, 1987, the District Court issued an order remanding the matter to the Corps of Engineers for further proceedings. (App. D at 25a-84a).

On September 14, 1987, the City of New Haven filed a notice of appeal. The Solicitor General determined not to appeal the Order, and on November 18, 1987 the federal defendants moved to dismiss the appeal of the City of New

Haven. On December 2, 1987, Mall Properties joined in the federal defendants' motion to dismiss. The Court of Appeals granted the motion and dismissed the appeal for lack of jurisdiction on March 11, 1988. (App. C at 24a).

The Court of Appeals held that the District Court's remand order was not a final appealable order susceptible to immediate review. The Court rejected New Haven's argument that the District Court had entirely disposed of the matter before it by remanding the proceeding. The Court held that the order was not a final judgment because it "does not grant Mall ultimately what Mall wants." (App. B at 8a). The Court found that what Mall Properties ultimately wants is "the proper permits themselves and, in the event of a judicial challenge to the permits, a judgment adjudicating Mall's

entitlement to the permits." (App. B at 7a). The Court concluded that the District Court order "is but one interim step in the process towards Mall's obtaining its ultimate goal." (App. B at 8a).

The Court of Appeals recognized that, although appeals have been allowed in some cases from orders remanding to an agency for further proceedings, those cases had all involved appeals by the government or a government agency from the imposition of a new or unsettled standard on the agency, which "had no avenue for obtaining judicial review of its own administrative decisions...." (App. B at 15a). The Court found the inability of an agency to appeal from its own determinations crucial, and held that this exception for immediate appeals by agencies from the imposition of a new legal standard was based on the fact

that "unless review were accorded immediately, the agency likely would not be able to obtain review." (App. B at 17a).

The Court concluded that the City of New Haven did not fall within this exception. Unlike the Corps of Engineers, the City will be able to seek judicial review if the permit is granted, and if the District Court upholds the grant, appeal to the Court of Appeals and argue that the original permit denial was proper. (App. B at 18a).

The City of New Haven filed a Petition for Re-hearing and Suggestion for Re-hearing en banc on March 24, 1988. The Court of Appeals denied the petition on April 7, 1988. (App. A 1a-2a).

THE PETITION SHOULD BE DENIED

The City of New Haven seeks a writ of certiorari to review a determination of the First Circuit Court of Appeals on

a procedural issue which is fully consistent with established law in the First Circuit and other circuits. Based on the policy that piecemeal appeals are to be avoided, it is a well-settled general rule that remand orders are not final decisions susceptible to immediate appellate review. Applying this rule, the Court below dismissed New Haven's appeal from the District Court's remand order for lack of jurisdiction.

The City has demonstrated no valid ground to disturb the Court of Appeal's well-reasoned determination. The remand order is not a final decision, but an intermediate step in this permit application proceeding. The Corps of Engineers has yet to make, in the remanded proceeding, a determination on Mall Properties' permit application, and there may be further appeals from the Corps of Engineers' decision.

Moreover, the District Court remanded the proceeding on two grounds: (i) the Corps' improper denial of the permit based on economic factors, and (ii) the failure of the Army Corps of Engineers to follow its own regulations in not giving Mall Properties an opportunity to rebut the supposed objections of the Governor of Connecticut. New Haven focuses solely on the economic issue and completely ignores the procedural issue. As remand to the Corps of Engineers was required in any event to correct this procedural error, dismissal of the appeal was appropriate for this reason alone to avoid piecemeal review.

New Haven argues that the District Court order is immediately appealable by the City under governing case law because the order imposes a new legal standard with respect to the economic issue on the

Corps of Engineers. New Haven is incorrect. As the Court below correctly concluded in its detailed analysis of the decisional law, the exception to the rule that remand orders are not immediately appealable applies only to appeals by federal defendants from remand orders which impose a new or unsettled legal standard on the government or government agency. The reason for this exception is that an agency has no avenue for review of its own decisions, and would have no later opportunity to appeal.

The City of New Haven does not fall within this exception to the general rule. Unlike a federal agency, the City will have a later opportunity to obtain review of the District Court order. If the permit is granted in the remanded proceeding, the City can raise the economic issue on appeal together with any other appealable issues arising from

the remanded proceeding. If the permit is denied on remand, and no appeal is taken, the disputed issue will become moot, and an unnecessary appeal will have been avoided. If an appeal is taken, the City can raise the economic issue at that time.

In any event, the District Court's ruling that the Army Corps of Engineers exceeded its authority in basing permit denial on economic factors is not a new legal standard requiring immediate review. The District Court merely followed this Court's decision in Metropolitan Edison Co. v. People Against Nuclear Energy ("Metropolitan Edison"), 460 U.S. 766 (1983) in holding that the Corps of Engineers may not base permit denial on economic effects unrelated to changes in the physical environment. In addition, the District Court's ruling requiring the Corps to adhere to its own

regulations, which the City consistently ignores, is hardly a novel one. If appellate review were so urgent, the federal defendants presumably would have appealed.

Moreover, the determination of the Court of Appeals that the administrative proceedings on the permit application should be completed, and all appealable issues saved for a single appeal, does not prejudice New Haven.

A. Standards For A Writ Of Certiorari

Pursuant to Rule 17.1 of this Court, a review on writ of certiorari "is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." New Haven argues its case with high blown rhetoric and purple prose in an apparent effort to capture and retain the Court's interest, but never addresses the standards it must meet for

review.

Supreme Court Rule 17.1 sets forth three categories of reasons that will be considered in reviewing a petition on writ of certiorari, two of which are pertinent here:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; ... or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> * * *
>
> (c) When ... a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

New Haven's hyperbole concerning an alleged conflict in the circuits and the urgent need for review notwithstanding, the decision of the Court below is not in conflict with the decisional law of any other court of appeals; nor does the decision of the Court of Appeals involve

an important or unsettled issue of federal law in need of resolution by this Court. The Court of Appeals merely decided the procedural issue of whether immediate review of New Haven's appeal from the remand order of the District Court was permissible. Based on the applicable law of the First Circuit and other courts of appeal, the Court determined that the remand order was not a final decision susceptible to judicial review. New Haven will have a later opportunity for judicial review if the permit it opposes is granted, or if the permit is denied, and that determination appealed.

B. The Court Of Appeals Correctly Applied The Established General Rule That Remand Orders Are Not Appealable

Pursuant to 28 U.S.C. §1291, the Court of Appeals has jurisdiction to review "all final decisions of the district courts...." As recognized by

the Court below (App. B at 8a), this Court has defined a final decision as "one which 'ends the litigation on the merits and leaves nothing for the Court to do but execute the judgment.' Catlin v. United States, 324 U.S. 229, 233 (1945)."

In dismissing New Haven's appeal from the District Court's remand order, the Court of Appeals applied the well-established general rule in the First Circuit and other courts that an order remanding a case to an administrative agency or board for further proceedings is not a "final decision" from which appeals may be taken. E.g., In re Abdallah, 778 F.2d 75 (1st Cir. 1985), cert. denied sub nom. Drury v. Abdallah, 476 U.S. 1116 (1986); Memorial Hospital System v. Heckler, 769 F.2d 1043 (5th Cir. 1985); Farr v. Heckler, 729 F.2d 1426, 1427 (11th Cir. 1984); Howell v.

Schweiker, 699 F.2d 524, 526 (11th Cir. 1983); Eluska v. Andrus, 587 F.2d 996 (9th Cir. 1978); Giordano v. Roudebush, 565 F.2d 1015 (8th Cir. 1977); Barfield v. Weinberger, 485 F.2d 696, 698 (5th Cir. 1973); Paul v. Secretary of Air Force, 457 F.2d 294, 297-98 (1st Cir. 1972); Dalto v. Richardson, 434 F.2d 1018 (2d Cir. 1970), cert. denied, 401 U.S. 979 (1971); United Transportation Union v. Illinois Central R.R., 433 F.2d 566 (7th Cir. 1970), cert. denied, 402 U.S. 951 (1971).

The reason for this rule is that a district court order remanding a case for further proceedings "does not terminate the litigation." Farr v. Heckler, 729 F.2d at 1427. In this regard, the Court of Appeals in Bohms v. Gardner, 381 F.2d 283, 285 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968) observed:

> Until the [federal defendant] acts on the remand we have no insight as to what his eventual decision will be. Thus in the words of Catlin v. United States the litigation had not reached its end on the merits and there is more for the court to do than execute the judgment....

The Court below succinctly stated the same principle with respect to the matter of Mall Properties' pending permit application:

> The litigation has not ended. It simply has gone to another forum and may well return again.

(App. B at 8a). The Court thus correctly concluded that the order remanding this matter to the Corps of Engineers for further proceedings is not a final decision within the meaning of 28 U.S.C. §1291, and therefore may not be appealed by the City of New Haven.

New Haven argues that the Court of Appeals failed to give the requirements

of finality a "practical rather than technical construction" (quoting Eisen v. Carlisle and Jacquelin, 417 U.S. 156, 170-71 (1974)) by treating the remand order as non-final. (Petition at 29, 31). This assertion is unfounded. The Court of Appeals explicitly focused on the practical question of whether the matter should be remanded for a determination on the permit application, which could moot the controversy over the economic issue, and save all appeals until after a final decision is made, or permit the City an immediate appeal, even though such appeal would be superfluous if the Corps later denied the permit on other grounds.

The Court of Appeals did exactly what this Court has directed should be done and what the City denies was done: it looked at the actual circumstances of the case, and balanced the particular

competing interests involved. It is the City which in actuality is arguing for a technical and not practical construction by asserting that because the District Court decided the economic issue, the remand order is a final decision, regardless of the facts and circumstances of the case which the Court of Appeals considered.

The fact of the matter is that New Haven is unhappy with the results of the Court's balancing process. However, the City provides no particularized reason why the Court of Appeal's balancing of interests should be disturbed. A "practical construction" of the finality rule by definition must depend on the facts and circumstances of each case. Despite New Haven's fancy rhetoric, the Court of Appeals' construction of the finality rule, based on the practical reality of the facts before it, does not

form a basis for judicial review.

C. Remand Was Required In Any Event To Allow The Corps Of Engineers To Comply With Its Own Regulations

In arguing that the District Court's ruling on the economic issue was a final decision, New Haven completely ignores the fact that the District Court remanded the proceeding on two grounds: not only the Corps of Engineers' improper reliance on economic factors unrelated to physical impacts, but also the Corps' failure to comply with its own regulation that Mall Properties have an opportunity to rebut the Governor of Connecticut's supposed objections to the proposed project.[3] As

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[3] In view of its failure to acknowledge the second ground for permit denial, New Haven's contention that "all the parties agreed" that the economic issue was the single "legal linchpin" of the permit denial is particularly disingenuous. (Petition at 32). It is also untrue, as Mall Properties raised several other arguments for vacating the Corps' order which the District Court found unnecessary to address since it

(continued...)

New Haven acknowledges (Petition at 30 n.7) "procedural or evidentiary deficiencies" of this type typically trigger a remand for further proceedings to correct the administrative error.

In Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986), for example, this Court held that a remand order from the court of appeals to the district court for further development of the facts is non-final, and not subject to appeal to the Supreme Court pursuant to 28 U.S.C. §1254(2). The remand order by the District Court to permit Mall Properties to respond to the Governor's perceived objection is also a remand for further development of the facts, and therefore non-final and non-appealable.

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[3](...continued)
remanded on other grounds. (App. D at 34a n.3).

Moreover, permitting New Haven to appeal the economic issue at this time, when the case must be remanded to allow Mall Properties to respond to the Governor in any event, would result in piecemeal review. That result is precisely what the Court of Appeals sought to avoid, and what New Haven seeks to achieve.

D. The Exception For Appeals By Federal Defendants Does Not Apply To New Haven

New Haven argues that the Court below has articulated a new rule of finality in conflict with the Tenth Circuit's rule in Bender v. Clark ("Bender") 744 F.2d 1424 (10th Cir. 1984). (Petition at 32). This argument is incorrect, and rests on a misapprehension of the limited holding of Bender, which is fully consistent with the Court of Appeals decision in this case. The court in Bender allowed the

federal defendant to appeal from a remand order imposing a different burden of proof to be applied by the government in the remanded proceeding because the standard of proof issue was a serious and unsettled one, but "most important", because the government "had no avenue for obtaining judicial review of its own administrative decisions and thus well might be foreclosed from appealing the district court's burden of proof ruling at a later stage of proceedings." (App. B at 15a). The crucial element of the decision in Bender and the other cases cited by the City in which federal defendants were allowed an immediate appeal is that "unless review were accorded immediately, the agency likely would not be able to obtain review."[4]

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[4] The federal defendants obviously recognized this rule when they declined to appeal from the District Court order

(continued...)

(App. B at 17a).

The Court below found that the City of New Haven does not fall within the exception articulated in Bender. As the Court noted, the federal defendants have not appealed from the District Court's rulings that (1) the Corps may not deny permits based on economic factors unrelated to physical changes to the environment and (2) the Corps violated its own regulations in not giving Mall Properties notice and an opportunity to rebut the governor's supposed opposition.[5]

New Haven's overblown rhetoric notwithstanding, the exception to non-

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[4](...continued)
and simultaneously moved to dismiss the appeal.

[5] New Haven's musings (Petition at 50) as to why the federal defendants determined not to appeal is sheer speculation and merits no consideration whatsoever.

appealability of remand orders for appeals by federal defendants in certain circumstances does not interfere with the City's rights as an intervenor. The test applied by the Court below, consistent with Bender and other courts of appeals, is not any distinction between party or intervenor status, but the ability of the appellant to later obtain judicial review. A special rule has been carved out for government and government agency defendants because they have no means to appeal their own decisions.

As set forth in Point E, infra, the City is not precluded from participation in the remanded proceeding. Furthermore, if the permits are granted, the City may raise the economic issue on appeal together with any challenges to the remanded proceeding. The policy reasons for allowing an immediate appeal by federal defendants simply does not

apply to New Haven.

E. The Dismissal of New Haven's Appeal to Avoid Piecemeal Review Does Not Prejudice New Haven

New Haven claims that the dismissal of its appeal somehow constitutes a denial of justice through delay (Petition at 34), but fails to explain how it will be prejudiced by further administrative proceedings on remand, and a determination on the permit application, followed by judicial review of all appealable issues in a single proceeding. The City relies on Dickinson v. Petroleum Conversion Corp., 338 U.S. 507 (1950). In Dickinson, however, the Court merely noted that questions of appealability involve the competing considerations of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." 388 U.S. at 511.

There is no danger that New Haven will be denied justice by delay. The Court below expressly held that the City was not foreclosed from participating in the permit proceedings on remand, and "[p]resumably ... can urge environmental reasons why the permit should be denied." (App. B at 18a). If the permit is denied on other grounds, and the denial if appealed, is affirmed, New Haven would have achieved its goal, and could not rationally claim to have been harmed.

On the other hand, if after remand the permits are granted, the City can seek judicial review. If the District Court upholds the permits, the City can appeal to the Court of Appeals and argue that the initial permit denial based on New Haven's economic interests was proper and raise any other objections to the

remanded proceedings. (App. B at 18a).[6] Thus, judicial review of the economic issue raised by the City is not denied; it is simply deferred so that all issues to be appealed, if not mooted by the Corps' determination, may be heard in a single proceeding.

New Haven's argument that dismissal of its appeal precludes it from bringing a subsequent challenge to the remanded proceedings in another jurisdiction is without merit. (Petition at 36). The City could have made a motion to change the venue of the original action if it truly believed that some other forum was

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[6] Although the District Court's ruling that the Corps of Engineers exceeded its authority could not be raised again in an appeal to the District Court from the Corps' decision after remand, it may be appealed by New Haven to the Court of Appeals. As New Haven is a party in this action, there is no reason why the Court of Appeals would refuse to hear its appeal after the proceeding is completed, and the Court below so found. (App. B at 19a).

more appropriate. It did not. New Haven's desire for forum-shopping does not outweigh the interests of judicial economy in avoiding piecemeal review.

The City's argument that neither Mall Properties nor the Corps of Engineers would be harmed if New Haven were permitted to appeal is incorrect. (Petition at 37). The piecemeal review requested by New Haven is contrary to the interests of both parties in the expeditious processing of Mall Properties' permit applications. The Corps of Engineers has no objection to the District Court's rulings, and in fact moved to dismiss the appeal. Most significantly, it is the Court of Appeals which would be harmed if New Haven's appeal were allowed to proceed, contrary to the policy against piecemeal review. As the Court itself held:

Were this court now to order

> briefing on the socio-economic issue, decide that issue and affirm the district court, the case would be remanded and the Corps once again would decide whether to issue the permit. Likely another appeal would follow, necessitating another round of briefs, another familiarization with the record, and another opinion. Our decision on the socio-economic issue might turn out to have been superfluous were the Corps on remand to deny the permits on independent proper grounds. More efficient and quicker, in the long run, would have been to delay review and consider all issues at one time.

(App. B at 20a).

The City never articulates how it has been harmed by the Court of Appeals' determination. Although New Haven complains about the legal costs of proceeding with the remanded proceeding, the interests of its taxpayers would be served if the permit review process continues in the most expeditious manner, with appeal of the economic issues saved until after a determination on the permit

application is made, and if appealed, reviewed by the District Court. If the permit is denied in the remanded proceeding and there is no appeal, New Haven taxpayers will have been saved unnecessary litigation costs. Considerations of judicial efficiency and the financial interests of the parties thus counsel against disturbing the dismissal of the appeal.

The Court of Appeals was cognizant of the City's concerns. The Court recognized that if review were granted, and the Court concluded that the District Court erred on both the economic issue and the procedural issue concerning the agency's failure to afford Mall Properties an opportunity to rebut the Governor's opposition, "an unnecessary administrative proceeding could be averted." (App. B at 21a). However, the Court concluded that permitting review of

interlocutory rulings would "undermine the final judgment rule and open the door to piecemeal litigation and its concomitant delay, costs and burdens." (App. B at 22a). There is no reason to disturb the Court's careful balancing of policy concerns.

F. The District Court Did Not Impose A Radical New Standard Justifying Immediate Review

New Haven argues that the District Court established a wholly new standard for Corps of Engineers permitting decisions which is inconsistent with existing law and which is in need of urgent remediation. The urgency claimed is non-existent; certainly no factual basis is provided to support the City's hyperbole. The absence of any urgency is confirmed by the decision of the federal defendants not to appeal. Moreover, the City's legal arguments are without merit.

New Haven argues that the District

Court misapplies Metropolitan Edison, fails to give adequate deference to alleged past practice by the Corps in considering economic impacts, and is inconsistent with the Corps' public review regulations and with the Council on Environmental Quality ("CEQ") regulations. New Haven is wrong on all counts.

As a preliminary matter, the courts are not bound by an agency's interpretation of the scope of its statutory authority where such interpretation is contrary to Congressional intent. See Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 464 U.S. 89, 97 (1983); North America Industries, Inc. v. Feldman, 722 F.2d 893, 898-99 (1st Cir. 1983).

1. Section 10 of the RHA

In any event, New Haven's assertion

that economic impacts unrelated to physical impacts have been considered by the Corps since 1933 is without basis. (Petition at 41). United States ex rel. Greathouse v. Dern ("Dern"), 289 U.S. 352 (1933), relied on by the City, does not support its position.[7] The petitioners in that case sought a writ of mandamus to compel the Secretary of War to authorize the construction of a wharf in the Potomac River pursuant to Section 10 of the RHA. The federal government had enacted legislation authorizing the establishment of a highway, which would require the purchase or condemnation by the federal government of a part of

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[7] New Haven argues that the Corps acknowledged a previously accepted practice to consider economic factors in the District Court. (Petition at 43). The memorandum of the federal defendants cited by the City, however, addresses no such practice. It only discusses the Dern case, which does not hold that the Corps may make permitting decisions based on economic competition.

petitioners' property and destruction of the wharf if constructed. At issue in Dern was whether, under the circumstances of the case, the extraordinary remedy of mandamus was appropriate. Holding that it had discretion to "refuse mandamus to compel the doing of an idle act" the Court denied the petition because the relief sought would be burdensome to the federal government and without any real benefit to the petitioners. 289 U.S. at 360. Dern thus involved exceptional circumstances where construction of the wharf would have been futile in any event, and a strong federal government interest and major project was involved. Dern does not authorize the Corps to balance the competing economic interests of two communities in promoting development in its permitting process.

Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910

(1971), contrary to the City's contention, does not give the Corps limitless discretion to deny a permit. In the first place, economics were not at issue in Zabel. Rather, the Corps had denied a permit because of the project's undue impacts to the physical environment. The court found that the Corps' consideration of environmental factors was authorized, and indeed required, by two other statutes -- NEPA and the Fish and Wildlife Coordination Act. Thus, the Corps there "t[ook] heed of", "effectuate[d]", and did "not thwart other valid statutory governmental policies." 430 F.2d at 209 (emphasis supplied). Zabel did not hold that the Corps could deny a permit for any political or economic reason it desired.

In Zabel, the Corps followed specific statutory directives in denying the permit. In Dern, too, the Corps'

determination was based on statutory directives respecting the federal highway project. In direct contrast, the District Court found that the Corps' permit denial was not based on any statutory directive, but was essentially an exercise of unbridled discretion without any Congressional authorization. Moreover, the lack of statutory authority for the Corps' conduct was compounded by the absence of any relationship between the economic interests on which the Corps based its decision, and any physical change to the environment.

2. The Public Interest Regulations

There is also no inconsistency between the District Court's decision and the Corps of Engineers' public review regulations. As the regulatory history of the public review regulations shows, the regulations do not authorize the

Corps, under the guise of environmental permitting decisions, to determine which of two communities should be allowed to stimulate economic development.

Until 1968, the Corps administered Section 10 of the RHA essentially to protect federal navigational interests.[8] In December 1968, the agency provided in its regulations for additional factors to be considered in Section 10 permit decisions. These factors, added "in response to a growing national concern for environmental values and related federal legislation . . .", included: "fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest." Deltona Corp. v. United States, 657 F.2d 1184, 1187 (Ct. Cl. 1981), cert. denied, 455 U.S.

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[8] See generally "Regulatory Programs of the Corps of Engineers", 42 Fed. Reg. 37122-23 (July 19, 1977) ("Regulatory Programs").

1017 (1982).

Congress recognized the public interest standard and its limited scope. The March 17, 1970 Report of the House Committee on Government Operations explained that:

> The Corps of Engineers, which is charged by Congress with the duty to protect the nation's navigable waters, should, when considering whether to approve applications for landfills, dredging and other work in navigable waters, increase its consideration of the effects which the proposed work will have, not only on navigation, but also on conservation of natural resources, fish and wildlife, air and water quality, esthetics, scenic view, historic sites, ecology, and <u>other public interest aspects of the waterway</u>.

H. Rep. No. 917, 91st Cong., 2d Sess. at 5 (1970) (emphasis supplied).

Section 404 of the CWA was enacted as part of the Federal Water Pollution Control Act of 1972 ("FWPCA"). In 1974, in order to implement Section 404 as well

as the requirements of other recent federal legislation, the Corps incorporated into its permitting regulations additional factors to be weighed, including "economics, historic values, flood damage prevention, land use classification, recreation, water supply, and water quality." Regulatory Programs at 37123 (emphasis supplied). See Jentgen v. United States, 657 F.2d 1210 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982).[9]

Although the regulations do not define the term "economics," the Corps' discussion preceding its 1977 regulatory amendments makes it clear that this new factor, like the others, was added in response to new federal legislation. Regulatory Programs at 37122. See also

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[9] The "economics" factor actually appeared for the first time in the interim regulations of May 10, 1973. 38 Fed. Reg. 12217 (May 10, 1973).

Deltona Corp. v. United States, 657 F.2d at 1187. The new legislation included FWPCA, the Marine Protection, Research and Sanctuaries Act of 1972 ("MPRSA"), the Coastal Zone Management Act of 1972, as amended ("CZMA"), and NEPA. 42 Fed. Reg. 37123 (July 19, 1977). Thus, the scope of the term "economics" must be ascertained by reference to such legislation.

None of this new legislation, however, anticipated or authorized the consideration of generalized economic factors. The FWPCA established Section 404, which provides only for an assessment of the economic impact of filling on the resources of a particular disposal site.

Pursuant to Section 404, Corps' permitting decisions are governed by guidelines developed by the Environmental Protection Agency ("EPA"). 33 U.S.C.

§1344 (b). These guidelines are to be based upon criteria comparable to those developed for ocean discharge permits pursuant to Section 403(c) of the Clean Water Act, 33 U.S.C. §1343(c)(1). The economic considerations within the ocean discharge criteria are limited to the economic values associated with the site to be filled (i.e. the "disposal site"). It follows that the economic criteria permissible under Section 404 are also those related to the disposal site.

Section 403 articulates certain general criteria which must be reflected in the ocean discharge guidelines. Among them are two which refer to economics:

> (C) The effect of disposal of pollutants on esthetics, recreation and economic values;
>
> * * *
>
> (G) the effects on alternate uses of oceans, such as mineral exploitation and scientific study.

33 U.S.C. §1343(c)(1). The EPA guidelines developed to implement the

ocean discharge criteria identify the following "economic" considerations:

> Potential for affecting the recreational and commercial values of living marine resources ....

40 C.F.R. §227.17(a)(2). The factors to be assessed in ascertaining the economic effects include the

> (a) Nature and extent of present and potential . . . commercial use of areas which might be affected by the proposed dumping;
>
> * * *
>
> (h) Presence in the material of any constituents which might significantly effect living marine resources of recreational or commercial value.

40 C.F.R. §227.18. See also 40 C.F.R. §227.19. In short, Section 404 instructs the Corps to base permitting decisions on certain criteria, and the economic aspects of those criteria are limited to effects on commercial values and uses of the disposal site. The Act does not authorize the Corps'

consideration of broader economic factors in the permitting process. This limited scope of economics was confirmed in Buttrey v. United States, 690 F.2d 1170, 1180 (5th Cir. 1982), cert. denied, 461 U.S. 927 (1983).

The MPRSA provides for the Corps to issue permits for the transportation of dredged material for the purpose of disposing it in ocean waters. The governing provision, Section 103 (33 U.S.C. §1413), allows for a permit where, inter alia, the dumping will not unreasonably impact the economic potentialities of the disposal site. As in the ocean discharge criteria, there is no generalized economic standard. The legislation is, of course, inapplicable to Mall Properties' application.

Likewise, the CZMA (16 U.S.C. §1451, et seq.) is inapplicable to the North Haven Mall site. Finally, NEPA is

a procedural statute which does not expand the Corps' substantive decisionmaking to incorporate general economic effects of enhanced competition. See Strykers Bay Neighborhood Council Inc. v. Karlen, 444 U.S. 223, 227 (1980); Cape May Greene, Inc. v. Warren, 698 F.2d 179, 188 (3d Cir. 1983).

Consequently, the legislation which precipitated the inclusion of the "economics" factor in the "public interest review" neither anticipates nor authorized the consideration of broad socio-economic concerns. Rather, the economic concerns of the legislation applicable to the Corps' decisionmaking have consistently and uncategorically been limited to those directly related to the filling of the disposal site and not to indirect secondary effects of the ultimate development activity.

3. NEPA

Nor is there any inconsistency between the CEQ regulations and the District Court decision. The regulations merely define "effects" to include direct and indirect effects of a proposed action. 40 C.F.R. §1508.8. The regulations do not require or even suggest, as claimed by the City, that effects not proximately causally related to a proposed action are to be considered under NEPA. Nor could the CEQ regulations be construed in such a manner in light of the Supreme Court's decision in Metropolitan Edison. Since the Metropolitan Edison decision occurred subsequent to the promulgation of the relevant CEQ regulations, Metropolitan Edison and the regulations must be read in para materia; the District Court's adherence to this Court's decision can hardly be considered a marked departure

from governing law.[10]

New Haven claims that Metropolitan Edison involved only the threshold question of whether an environmental impact statement ("EIS") should be prepared and that the District Court applied Metropolitan Edison to the impacts to be considered in an EIS "for the first time." (Petition at 15). New Haven also argues that subsequent courts have limited Metropolitan Edison "to the threshold question of whether NEPA applies in the absence of recognized impacts." (Petition at 45). The City's interpretation of Metropolitan Edison and its progeny, and its attempts to distinguish these cases, is incorrect.

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[10] To the extent that the Corps' public interest review regulations are based upon NEPA, Metropolitan Edison had the same effect; thus the District Court's decision, as with the CEQ regulations, hardly constitutes a radical departure from existing standards.

It is clear from the Metropolitan Edison opinion that this Court did not intend to limit its holding to the threshold question of whether an EIS is required. At issue in that case was the interpretation of Section 102 of NEPA, 42 U.S.C. §4332(C), which directs all federal agencies to evaluate the "environmental impact" and any unavoidable adverse "environmental effects" of agency action significantly affecting the quality of the human environment. This Court held that the terms "environmental impact" and environmental effects" include "a requirement of a reasonably close causal relationship between a change in the physical environment and the effect at issue." 460 U.S. at 774. There is nothing in the opinion to suggest that the Court's general interpretation of this statutory provision was not intended

to apply to all NEPA issues, including the types of impacts that may be considered in an EIS.

A critical factor, which the City has overlooked, is that the term "environmental impact" as used in § 102 of NEPA, has the same meaning whether applied to the threshold question of the need for an EIS or the contents of an EIS. The City wants to draw an artificial distinction and assign a different meaning to the same words depending on the stage of the NEPA process solely to bolster its position. It is inconceivable, however, that Congress could have intended such an irrational construction of the statute.

Moreover, the City's reliance on Animal Lovers Volunteer Association, Inc. v. Weinberger ("Animal Lovers"), 765 F.2d 937 (9th Cir. 1985) and Pacific Northwest Bell Telephone Co. v. Dole ("Pacific

Northwest"), 633 F. Supp. 725 (W.D. Wash. 1986) for the proposition that Metropolitan Edison has been limited to the threshold question of whether NEPA applies is misplaced. (Petition at 45). In both cases the plaintiffs challenged the adequacy of the EIS. Animal Lovers, 765 F.2d at 938; Pacific Northwest, 633 F. Supp. at 726. Moreover, in Olmstead Citizens For a Better Community v. United States, 606 F. Supp. 964 (D. Minn. 1985), aff'd, 793 F.2d 201 (8th Cir. 1986), the district court applied Metropolitan Edison not only to the threshold question of the need for an EIS, but also to its alternative holding that the document prepared by the agency met the standards for an EIS, and was adequate. 606 F.Supp. at 974.

These authorities demonstrate that the courts have applied the "causally related standard" of Metropolitan Edison

to both aspects of the NEPA process--the threshold question of the need for an EIS and the scope of an EIS. The District Court's application of Metropolitan Edison falls squarely within this framework, and is fully consistent with Metropolitan Edison and its progeny.

The District Court's reliance on Metropolitan Edison is also fully consistent with the Second and Ninth Circuit cases cited by the City.[11] Rochester v. United States Postal Service, 541 F.2d 967, 973 (2d Cir. 1976); Davis v. Coleman, 521 F.2d 661, 676-77 (9th Cir. 1975); Bersani v. EPA,

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[11] Contrary to New Haven's assertions, Mall Properties did take issue with the EIS prepared by the Corps, by giving comments and critiquing, among others, the economic issues discussed in the EIS. In addition, Mall Properties argued in the District Court that the economic effects found by the Corps were overstated. Thus, Mall Properties did challenge the Corps' analysis of the economic issue.

Nos. 87-6275, 87-6295, (2d Cir. June 8, 1988). Rochester v. United States Postal Service involved a decision committed to agency discretion; e.g., whether to close or move a federal facility. There was no third party permit applicant. In that circumstance, unlike the instant matter, the federal agency is not regulating the private use of property, and the agency can consider economic factors. The Corps of Engineers in environmental permitting matters is, however, not vested with such unfettered discretion.

Davis v. Coleman involved the proposed construction of a major highway interchange in an agricultural area. The Court's holding that the agency was required to consider the environmental effects of the development which would result from the construction of the interchange is consistent with the

Metropolitan Edison standard. The impacts of urban development are physical changes to the environment which are at the heart of NEPA and which this Court found appropriate for consideration in an EIS, unlike the attenuated economic interests considered by the Corps. In addition, there was a direct causal link between the construction of the interchange and the changes to the physical environment which induced growth would bring. The opinion does not authorize the Corps to consider purely economic factors in its permitting decision. Moreover, both Rochester and Davis were decided prior to Metropolitan Edison. To the extent they differ from holding of Metropolitan Edison, the cases are not controlling.

Bersani v. EPA, which arose under Section 404 of the CWA, and not NEPA, involved the issue of alternative sites for a proposed shopping mall and the

relevant time period for determining whether an alternative site is available. The question of whether more than one mall could survive in the market area for purposes of alternative site analysis (slip op. at 3703) has nothing whatsoever to do with the scope of the Metropolitan Edison standard or the question of whether the Corps has statutory authority to deny a permit based on economic factors. Bersani related to the practicality of alternatives, not impacts.

The City's claim that the District Court's decision and supposed misplaced reliance on Metropolitan Edison has "imposed a new legal standard" (Petition at 43) is sheer hyperbole. The District Court announced no such standard. The District Court merely held that in this particular case, the potential social and economic effects considered dispositive

by the Corps lacked the requisite proximate causal relationship to the proposed shopping mall, and that the Corps had thus considered unlawful factors in its determination.

The City's assertion that the District Court substituted its own judgment concerning the factors to be considered by the Corps, and took upon itself the role of political decision maker, ignores the Court's well reasoned determination and is entitled to no consideration. Similarly, the assertion that dismissal of the appeal placed "the fate of thousands of acres of wetlands within New England" at stake without appellate review is nonsense. (Petition at 47.) There is nothing in the District Court's decision to preclude consideration of direct physical effects on the wetlands in the remanded proceeding. To the contrary, the

District Court noted that protection of the physical environment and natural resources should be the focal point of the Corps decision in the remanded proceeding. (App. D at 76a.)

We would respectfully suggest, in any event, that the City's concerns, to the extent that they have any validity, are more properly addressed in the first instance by the Corps of Engineers and not by the Court of Appeals. The Corps is in a better position than the Court to determine the weight it should accord to various factors in light of the District Court's opinion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be denied.

Respectfully submitted,

Daniel Riesel
460 Park Avenue
New York, New York 10022
212-421-2150

Counsel for Respondent

Sive, Paget & Riesel, P.C.
Attorneys for Respondent

Mark A. Chertok
Karen E. Gross
On the Brief